No. 11,306

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TAKEO TADANO,

Appellant,

vs.

O. W. MANNEY, Officer in Charge, United States Immigration and Naturalization Service at Phoenix, Arizona,

Appellee.

BRIEF FOR APPELLANT.

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STATEMENT OF THE CASE.

The appellant, Takeo Tadano, was last admitted to the United States at San Francisco, California, on January 5, 1929; he was a native of and subject of Japan and of the Japanese race; he was admitted to work in the Toyo Sauce Manufacturing Company of Los Angeles, California; he was admitted under the Treaty of Commerce entered into between the United States and Japan, and under the provision thereof which provided (37 Statutes 1504):

> "citizens or subjects of the contracting parties shall have liberty to enter, travel and reside in territory of other, to carry on trade, wholesale

> and retail, to own, lease and occupy houses, factories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes and generally to do any and all things necessary or incident to trade upon the same terms as native citizens,"

and under the provisions of the act of 1924, Chapter 190, Section 3, 43 Statute 154; he was employed by the Toyo Sauce Company until it failed in 1932; from that time on he lived in and about Phoenix, Arizona; he attended high school at Glendale, Arizona, finished high school and then engaged in business for himself, operating a wholesale produce business where he was engaged at the time of his arrest. He married a native born Japanese woman, an American citizen, and now has three children born of that marriage.

On the 26th day of December, 1940, he was arrested under a warrant issued by the Department of Justice of the United States of America directed to the director of Immigration and Naturalization at El Paso, Texas, in which warrant it was charged that appellant

> "had been found in the United States in violation of the Immigration Laws thereof and is subject to be taken into custody and deported pursuant to the following reasons, to-wit: The Act of 1924, in that he has remained in the United States after failing to maintain the exempt status, under which he was admitted, of an alien entitled to enter the United States solely to carry on trade, under and in pursuance of the provisions

of the present existing treaty of commerce and navigation."

That said warrant directed that the district director of Immigration and Naturalization take said alien into custody and grant him a hearing to enable him to show cause why he should not be deported, in conformity with the laws. Upon this warrant appellant was arrested and was, after a considerable length of time, accorded what was purported to be a hearing and as a result of said purported hearing was ordered deported to Japan; at that time no transportation being available, appellant was released on bond and was subsequently placed in an internment camp where he remained until about the 1st day of December, 1945, at which time he was again taken into custody by the Department of Immigration and Naturalization Service, preparatory to deporting him to Japan; on the 5th day of December, 1945, appellant presented to the Honorable Dave W. Ling, Judge of the United States District Court, in and for the District of Arizona, his petition for a Writ of Habeas Corpus (T. R. pp. 6, 7 and 8) and on said December 5, 1945, upon hearing said petition, the Writ of Habeas Corpus was granted by the Judge of the District Court, in and for the District of Arizona (T. R. pp. 11-12), and said writ was issued (T. R. pp. 16-17); the return to said writ was made by the officer in charge of the Immigration and Naturalization Service and in whose custody appellant was at that time (T. R. pp. 19-20). Subsequently thereto, to-wit, on January 2, 1946, a hearing was had on said petition for a Writ of

Habeas Corpus and said writ was discharged and petitioner remanded to the custody of the Immigration and Naturalization Service from which action appellant prosecutes this appeal.

There being no appeal from the orders of the Immigration and Naturalization Service;

Bilokumsky v. Tod, 263 U. S. 149;
Zakonaite v. Wolf, 226 U. S. 272;
Gegiow v. Uhl, 239 U. S. 3.

the jurisdiction of the United States District Court was invoked by the filing of the petition for a Writ of Habeas Corpus, such jurisdiction being founded upon Section 2, Article III of the Constitution of the United States of America, in that it involves a case in law, arising under the Constitution and laws of the United States and a treaty made under the authority of the Constitution and laws of the United States, and upon Section 41 and 451 of Title 28, United States Code; the jurisdiction of the United States Circuit Court of Appeals is founded upon Sections 225 and 463 of Title 28, United States Code and upon the rules of this Honorable Court and was invoked by the filing of the notice of appeal in the United States District Court. (T. R. p. 88.)

QUESTIONS INVOLVED.

The questions involved upon this appeal are:

1. That a native immigrant alien admitted to the United States under the treaty of Navigation and Commerce with Japan, under the Act of 1924, acquired a status under the Act of 1924, and is subject to deportation only for a change of the exempt status required to be maintained by the Act at the time he was admitted and cannot be deported for a violation of additional requirements enacted in a statute amending the statute under which he was admitted.

2. That temporary departure from the exempt status for the purpose of obtaining an education and preparing himself to better carry on the status of "treaty trader" does not subject the alien to deportation.

3. That the Department of Immigration and Naturalization cannot lawfully deport an alien upon an unsigned, unverified written statement of one of its inspectors, being his conclusions obtained from an interview with the alien before the alien is given the right to employ counsel and advised in his rights, and particularly where the person taking the statement is not produced for cross-examination at the hearing and that a finding and based upon such evidence, requiring deportation of the alien is contrary to the rules and regulations of the Department of Immigration and Naturalization, and contrary to the laws and violates the Constitution of the United States of America.

4. That the due process clause of the United States Constitution required that prior to deportation of an alien he be given a full and fair hearing upon the charges stated in the warrant of arrest, and that an alien cannot be deported upon any grounds other than stated in the warrant of arrest, and particularly upon which he had not had notice and opportunity to prepare for a full and fair hearing.

SPECIFICATIONS OF ERROR.

SPECIFICATION OF ERROR No. I.

The Court erred in making the following finding of fact:

> "1. That at the time of the issuance of the Writ of Habeas Corpus in this matter petitioner herein was being held in the legal custody of O. W. Manney, officer in charge of the Phoenix sub-office of the United States Immigration and Naturalization Service, pursuant to the directions of a Warrant of Deportation, issued by the Immigration and Naturalization Service on December 1, 1942. (32)"

upon the grounds and for the reason that while petitioner was in the custody of respondent, when the writ was issued, that said custody was in no wise legal and was illegal because petitioner had never been accorded a full and fair hearing by the United States Immigration and Naturalization Service, in this, that the only evidence adduced at the hearings before said Immigration and Naturalization Service,

tending to show that petitioner had departed from his exempt status was inadmissible and incompetent under the laws and under the rules and regulations of the said department, for the following reasons, to-wit: That such evidence was contained in a statement prepared and signed by one Phillip C. Burner not under oath, said Phillip C. Burner not being present at the hearing, and not signed by appellant, nor sworn to by him, and which statement was merely the conclusion of said Phillip C. Burner from various claimed interviews with appellant and that said statement was the only evidence tending to show departure from the exempt status and that all of the other evidence showed that appellant had, at all times, maintained his exempt status as treaty trader, and that said custody was illegal upon the further grounds that the deportation of appellant was ordered upon the grounds that the treaty of Navigation and Commerce with Japan (37 Statutes 1504) had been abrogated, this being a matter upon which appellant had never been charged and never been granted a hearing and the imprisonment of appellant on that ground was a violation of the due process clause of Constitution of the United States of America.

SPECIFICATION OF ERROR NO. II.

The Court erred in making the following finding of fact:

> "2. That said Warrant of Deportation was issued after the petitioner had been given a full and complete hearing by the United States Immigration and Naturalization Service, at which

hearing petitioner was represented by counsel; that after said hearing had been completed and the record thereof submitted to the Board of Immigration Appeals, the following Findings of Fact and Conclusions of Law were made, and the following Order was entered by it:

Findings of Fact: Upon the basis of all the evidence adduced at the hearing, it is found:

(1) That the respondent (petitioner herein) is an alien, a native and citizen of Japan, Japanese race;

(2) That the respondent (petitioner herein) last entered the United States at San Francisco, California, on January 5, 1929;

(3) That the respondent (petitioner herein) was admitted to the United States under Section 3 (6) of the Immigration Act of 1924 to carry on trade under and in pursuance of the Treaty of Commerce and Navigation entered into between the United States and Japan;

(4) That the Treaty of Commerce and Navigation between the United States and Japan was abrogated on January 26, 1940;

(5) That the respondent (petitioner herein) did not apply for any other status;

(6) That the respondent (petitioner herein) has remained in the United States since the treaty was abrogated. Conclusions of Law: Upon the basis of the foregoing Findings of Fact, it is concluded:

(1) That under Sections 14 and 15 of the 1924 Act the respondent (petitioner herein) is subject to deportation because he is in the United States in violation of the Immigration Act of

May 26, 1924, in that he had remained in the United States after failing to maintain the exempt status under which he was admitted of an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of the Treaty of Commerce and Navigation abrogated on January 26, 1940;

(2) That under Section 20 of the Act of 1917 the respondent (petitioner herein) is deportable to Japan at Government expense.

ORDER: It is ordered that the alien be deported to Japan on the charge stated in the warrant of arrest." (33)

upon the grounds and for the reason that the records of the proceedings (respondent's Exhibit I in evidence, page 25, T. R.) show that the only evidence before the Immigration and Naturalization Service that appellant had departed from his exempt classification was the evidence of one Phillip C. Burner which was in the form of a written statement by said Phillip C. Burner not under oath, said Phillip C. Burner not being present at the hearing, and which was not signed by appellant nor sworn to and which was a conclusion of said Phillip C. Burner from various interviews with appellant and which shows on its face as having been obtained before appellant was advised of his rights, all of which is in violation of the rules and regulations of the Immigration and Naturalization Service and said statement is incompetent under the laws and that said finding of fact is based upon the findings of fact and conclusion of law of the Immigration and Naturalization Service which are founded

upon the said statement of Phillip C. Burner, as hereinbefore set out, and upon the grounds that the evidence shows that petitioner last entered the United States in 1929, under the act of 1924 which did not require that petitioner maintain the exempt status of "treaty trader" and that the Board of Immigration Appeals ordered his deportation under the 1932 amendment which did not apply to appellant. That in ordering deportation the Board of Immigration Appeals applied an erroneous rule of law and the District Court's finding that such findings of fact and conclusions of law of said Board of Immigration Appeals are true is erroneous, and upon the further grounds that said finding and the order of the board upon which said findings of the Court are based are unlawful in that both the finding of the Court and the finding of the Board of Immigration Appeals are violative of the Constitution of the United States and the due process clause thereof, for the reason that petitioner is ordered deported upon the grounds that the Treaty of Commerce and Navigation with Japan was abrogated on January 26, 1940, being a ground upon which appellant was never charged nor upon which he had no notice that he would be called upon to defend and upon which he had no hearing nor opportunity to defend and that the Court had no authority to base its judgment in this case upon a matter upon which appellant had never been charged with and upon which he had never been given a hearing.

SPECIFICATION OF ERROR NO. III.

That the Court erred in making the following finding of fact:

> "3. That the Findings of Fact made by said Board of Immigration Appeals are supported by the evidence presented at petitioner's deportation hearing and the court finds that they are true; that petitioner is an alien residing in the United States without a proper permit and without being within any of the exempted classes set forth in Paragraph 203, Title 8, U.S.C.A. (Immigration Act of 1924, 43 Stat. 154)."

upon the grounds and for the reason that said Finding of Fact made by the Board of Immigration Appeals are not supported by the evidence presented at petitioner's deportation hearing, and are not true, in this, that the only evidence that petitioner had departed from his exempt classification was a statement of Phillip C. Burner not under oath, said Phillip C. Burner not being present at the hearing, and which was not signed by appellant nor sworn to and which statement was merely a conclusion of Phillip C. Burner from various interviews with appellant and which said statement showed that before it was purported to be taken appellant was not advised of his rights and the law and the rules of the department and that said evidence by virtue of the rules of the department is incompetent, and upon the further grounds that said appellant is ordered deported by virtue of the abrogation of the treaty, a ground upon which he was never charged in the warrant or given

a hearing, for even assuming the said statement of Phillip C. Burner to be true it shows merely a temporary departure from status which is not grounds for deportation and in this particular the department of Immigration and Naturalization applied an erroneous rule of law and the Court erred in finding that the conclusions of law were correct.

Specification of Error No. IV.

The Court erred in its Conclusion of Law No. 2, being as follows:

> "2. That the petitioner had been given a full, legal and fair hearing by the United States Immigration and Naturalization Service."

in that the evidence of the statement of Phillip C. Burner was inadmissible for any purpose it not being signed by appellant and being contrary to the rules and regulations of the department of Immigration and Naturalization.

Specification of Error No. V.

The Court erred in its Conclusion of Law No. 3, being as follows:

> "3. That Japanese aliens who enter the United States, pursuant to subsection 6, Paragraph 203, Title 8, U.S.C.A. (Immigration Act of 1924, 43 Stat. 154), do not retain their exempt status as 'treaty traders' since the abrogation of the commercial treaty of 1911, between the United States of America and Japan."

in that said Conclusions of Law is erroneous and inapplicable to appellant for the reason that the warrant of arrest charged only that appellant had failed to maintain his exempt status under the treaty with Japan and under the Immigration laws of the United States, and that the warrant of deportation expressly provides that he be deported upon the charge laid in the warrant of arrest and that he was never given a hearing upon the question of the abrogation of the treaty and that the application of this Conclusion of Law to appellant deprives him of the rights granted by the United States Constitution and the due process clause thereof.

Specification of Error No. VI.

That the Court erred in its Conclusion of Law No. 4, which is as follows:

> "4. That aliens remaining in the United States after losing their status as 'treaty traders' and who have not been granted permission by the Immigration and Naturalization Service to remain in the United States under one of the other classifications set forth in Paragraph 3, Title 8, U.S.C.A. (Immigration Act of 1924, 43 Stat. 154), are subject to deportation under the provisions of Paragraphs 214 and 215, Title 8, U.S.C.A. (Immigration Act of 1924, 43 Stat. 162)."

in this, that it is based upon an erroneous Finding of Fact that as hereinbefore in Specification of Error No. II set forth, that the Court applied an erroneous

rule of law and that said Conclusion of Law is contrary to the law.

SPECIFICATION OF ERROR NO. VII.

That the Court erred in its Conclusion of Law No. 5, which is as follows:

> "5. That since the abrogation of the 1911 Treaty of Commerce with Japan on January 20, 1940, the petitioner, Takeo Tadano, has been illegally remaining, and continues to remain illegally within the United States and is subject to deportation; that the Order heretofore made by the Board of Immigration Appeals ordering petitioner's deportation is legal and proper and that petitioner (34) was at the time of the issuance of the Writ of Habeas Corpus in this matter legally and properly in the custody of respondent, O. W. Manney, Officer in Charge of the Phoenix Sub-office of the United States Immigration and Naturalization Service."

is erroneous upon the grounds that the order of deportation heretofore made is illegal and improper being based upon illegal and improper Findings of Fact by the Board of Immigration Appeals, in this, that the only competent evidence in the case shows that appellant did not depart from his exempt status as "treaty trader" and shows that he is entitled to remain in the United States and upon a further ground that petitioner's deportation is ordered upon the ground based in the warrant of arrest and said facts alleged in the warrant of arrest have not been proven by competent evidence and upon a further

ground that said Findings of Fact are based upon the Findings of Fact and Conclusions of Law erroneously made by the Board of Immigration Appeals upon the charge that appellant had remained in the United States after the treaty of Navigation and Commerce with Japan had been abrogated, being a ground upon which he was never charged or given a hearing.

SPECIFICATION OF ERROR NO. VIII.

The Honorable Court erred in making Conclusion of Law No. 6, which is as follows:

> "6. That the Writ of Habeas Corpus heretofore issued should be quashed, the petition dismissed, and that the petitioner should be remanded to the custody of said respondent."

upon the ground and for the reason it is based upon the other five Conclusions of Law, assigned as error and is not supported by the evidence or by law.

ARGUMENT.

"1. THAT A NATIVE IMMIGRANT ALIEN ADMITTED TO THE UNITED STATES UNDER THE TREATY OF NAVIGATION AND COMMERCE WITH JAPAN, UNDER THE ACT OF 1924, ACQUIRED A STATUS UNDER THE ACT OF 1924, AND IS SUBJECT TO DEPORTATION ONLY FOR A CHANGE OF THE EXEMPT STATUS REQUIRED TO BE MAINTAINED BY THE ACT AT THE TIME HE WAS ADMITTED AND CANNOT BE DEPORTED FOR A VIOLATION OF ADDITIONAL REQUIREMENTS ENACTED IN A STATUTE AMENDING THE STATUTE UNDER WHICH HE WAS ADMITTED."

This proposition refers to Specifications of Error Nos. II, III, V, VI and VII.

Appellant was admitted to the United States at San Francisco, California on January 5, 1929; he was a native and subject of Japan; he was admitted under the Treaty of Commerce and Navigation between the United States and Japan (37 Statutes 1504); he was admitted to work in the Toyo Sauce Manufacturing Company of Los Angeles, California. (T. R. 39.) He worked for the Toyo Sauce Company for about two years until the company went broke; he then attended high school at Glendale, Arizona, and operated a produce stall in the wholesale produce terminal market at Phoenix, Arizona for seven or eight years. Since the Toyo Sauce Company went broke he did not engage in the business of buying and selling merchandise between the United States and Japan.

It is the contention of the government that when he ceased to work in an industry that was engaged in commerce between Japan and the United States that he became subject to deportation.

The Treaty (37 Statutes 1504) provides as follows:

> "citizens or subjects of the contracting parties shall have liberty to enter, travel and reside in territory of other, to carry on trade, wholesale and retail, to own, lease and occupy houses, factories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes and generally to do any and all things necessary or incident to trade upon the same terms as native citizens,"

The Act of 1924 being Chap. 190, Section 3, 43 Statutes, 154, 8 U.S.C. 203, before the 1932 amendment and being the act under which he was admitted, read as follows:

> "When used in this act the term 'Immigrant' means any alien departing from any place outside the United States destined for the United States except * * * (6) an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation."

On July 6, 1932, the Act was amended by Acts of 1932, Chapter 434, 47 Statutes 607, 8 U.S.C. 203, and amended reads as follows:

> "(6) an alien entitled to enter the United States solely to carry on trade between the United States and the foreign state of which he is a national under and in pursuance of the provisions of a treaty of commerce and navigation, and his wife, and his unmarried children under 21 years of age if accompanying or following to join him."

On July 1, 1940, the Act in question was again amended, being the Act of 1940, Chapter 502, Section 2, 54 Statutes 711, 8 U.S.C. 215, which amendment reads as follows:

> "Section 15 amended to read: 'The admission to the United States of an alien exempt from the class of immigrants by clause (1), (2), (3), (4), (5), or (6) of Section 3 * * * shall be for such time and under such conditions as may be by regulations prescribed * * *. To insure that at the expiration of such time or upon failure to maintain the status under which he was admitted, he will depart from the United States * * *."

From the reading of the three different enactments it appears that at the time petitioner was admitted the law permitted any activity which was permitted by the treaty. When appellant arrived in the United States and established his status he cannot subsequently be required to enter into a different business because of a change of the status. The Supreme Court of the United States has passed upon what constitutes trade within the meaning of this treaty in

Asakura v. Seattle, 265 U. S. 332, LC 342,

the Court said:

> "the phrase, 'to carry on trade' is broad. That it is not to be given a restricted meaning is plain, the clause * * *, goes to show the intention of the parties that citizens or subjects of either shall have liberty in the territory of the other to engage in all kinds and classes of business that are or reasonably may be embraced within the meaning of the word trade as used in the treaty."

In that case, *Asakura v. Seattle,* supra, the alien was resisting a local ordinance requiring all pawn brokers to be citizens and the court used the language quoted in defining the rights of aliens under the treaty with Japan which is herein questioned.

Several other cases are enlightening on this point, one is the case of a Japanese editor of a Japanese newspaper published in San Francisco, California. The Court held that he was engaging in trade within the meaning of the treaty:

Shizuko Kumonomido v. Nagle (CCA 9th), 40 Fed. (2d) 42,

wherein the Court said:

> "the precise point involved in this case is the question of whether or not an alien who is an editor of a Japanese newspaper published in San Francisco and distributed locally but who is not the proprietor or publisher of such paper is entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of the present existing treaty of commerce and navigation."

The provisions of Article I of the Treaty with Japan have been construed by the Supreme Court in the case of *Asakura v. Seattle,* 265 U. S. 342, 44 Supreme Court 515, 68 Law. Ed. 1041, in an opinion delivered by Justice Butler wherein it was held the phrase "to carry on trade" was broad enough to cover a local pawn broker's business established in Seattle and there is no suggestion that the treaty right is confined to international trade.

"2. THAT TEMPORARY DEPARTURE FROM THE EXEMPT STATUS FOR THE PURPOSE OF OBTAINING AN EDUCATION AND PREPARING HIMSELF TO BETTER CARRY ON THE STATUS OF "TREATY TRADER" DOES NOT SUBJECT THE ALIEN TO DEPORTATION."

This proposition refers to Specifications of Error Nos. II, III, VI and VIII.

The District Court, in its findings of fact and conclusions of law (T. R. 85) expressly finds that the findings of fact made by the Board of Immigration Appeals are supported by the evidence presented at appellant's deportation hearing and finds that they are true. And finds that petitioner has lost his exempt status by reason of his failure to engage in commerce continuously and the findings of the Board of Immigration Appeals are presumably based upon the hearing conducted by L. M. Brody, Inspector in charge at Phoenix, Arizona, January, 24, 1941 (T. R. 46), and the only evidence of departure from that status is the statement of Phillip C. Burner, said Phillip C. Burner not being produced as a witness for cross-examination. Other portions of this argument are addressed to the incompetency of such evidence but herein we will assume although not admit that the facts appearing in said statement are true. In this regard we respectfully refer the Court to the case of:

Naoe Minamiji v. Carr, Director, 46 Fed. Supp. 627, wherein the question was whether the husband of petitioner appellant was a "treaty trader", therein the court said:

> "Fukujiro Minamiji first entered the United States on September 13, 1915, and resided therein

continuously until he left on a temporary visit to Japan in December, 1928. Upon this visit he married appellant. At the first time of his entry he was 15 years old. He went to live with his father who conducted a farm at Chula Vista, California, for about three years he worked on the farm, during which time he attended night school. From 1918 to 1922 he worked in a newspaper office in Los Angeles as Clerk; from 1922 to 1925, he attended Central Junior High School in Los Angeles, during his summer vacations he worked at the occupation of fisherman. From May 8 to November 1926 he attended school in Detroit, Michigan. In January 1927 he purchased 20 shares of the capital stock of the Nippon Company, a domestic corporation, conducting a mercantile business in the city of San Diego, paying therefor $1500.00 * * *."

The Court further says in discussing his status and the fact that he for a time worked as a farm laborer:

"It is true that Fukujiro Minamiji upon his entry into the United States as a boy of 15 years began life as a farm laborer but it also appears that he devoted himself assiduously to acquiring an education that would ultimately materially aid him in qualifying him for the status he now claims. It certainly is not the law that he might not change his status from a mere domiciled alien to a merchant * * * the evidence in this case establishes the fact that appellant's husband, from the time he left school, made rapid strides toward qualifying himself in the class he claims. We are of the opinion the evidence impels that he succeeded and was entitled to be classified as a treaty alien."

The Ninth Circuit Court then reversed the order of the District Court, discharging the Writ of Habeas Corpus.

In the case of:

Kanome Susukie v. Harris, 29 Fed. Supp. 46 wherein it was held that an alien admitted under the Act of 1924 as a "treaty trader" and who never had engaged in commerce with Japan, but was employed in an industry which traded solely within the United States was not deportable under the 1932 amendment and that the law under which he was admitted governed his status for the purpose of deportation.

"3. THAT THE DEPARTMENT OF IMMIGRATION AND NATURALIZATION CANNOT LAWFULLY DEPORT AN ALIEN UPON AN UNSIGNED, UNVERIFIED WRITTEN STATEMENT OF ONE OF ITS INSPECTORS, BEING HIS CONCLUSIONS OBTAINED FROM AN INTERVIEW WITH THE ALIEN BEFORE THE ALIEN IS GIVEN THE RIGHT TO EMPLOY COUNSEL AND ADVISED IN HIS RIGHTS, AND PARTICULARLY WHERE THE PERSON TAKING THE STATEMENT IS NOT PRODUCED FOR CROSS-EXAMINATION AT THE HEARING AND THAT A FINDING BASED UPON SUCH EVIDENCE, REQUIRING DEPORTATION OF THE ALIEN IS CONTRARY TO THE RULES AND REGULATIONS OF THE DEPARTMENT OF IMMIGRATION AND NATURALIZATION, AND CONTRARY TO THE LAWS AND VIOLATES THE CONSTITUTION OF THE UNITED STATES OF AMERICA."

This proposition refers to Specifications of Error Nos. I, II, III, IV, VI and VIII.

A hearing was had at Phoenix, Arizona, before L. M. Brody, presiding inspector (T. R. 46), United States Immigration and Naturalization Service, on

January 24, 1941. The appellant was sworn and testified and several other witnesses were sworn and testified. None of the oral testimony taken at said hearing substantiated the findings of fact and conclusions of law of the Board that appellant had ever departed from his exempt status as "treaty trader", in fact all of such evidence is exactly to the contrary, the only statement to the effect that he had abandoned his exempt status is found in Exhibit "2" (T. R. 63) which is the report of investigation in the case of Takeo Tadano, alias George Tadano, Japanese, relative to his right to be and remain in the United States and such investigation was conducted at the office of the inspector in charge of Immigration and Naturalization at Phoenix, Arizona, December 23, 1940, by Phillip C. Burner, examining officer and acting stenographer and that it was conducted in the English language. The investigation was conducted before appellant was advised of his rights in the Japanese language, with benefit of an interpreter, before he had explained to him in Japanese language the nature of the charge and before he could obtain counsel, and the only part of that statement which would show departure from status is the following questions and answers on page 66 of the Transcript of Record:

"Q. How long did you attend high school?

A. About 3½ years, until some time in 1934.

Q. After you finished school, what did you do?

A. I went to work for my brother, Tadashi Tadano, on his farm near Glendale, Ariz.

Q. What kind of work have you done for him?

A. All like he does, farm labor, cutting vegetables and any other work necessary about the place.

Q. Have you been connected with any firm engaged in the importing or exporting business since the Toyo Sauce Company went broke?

A. No.

Q. How much does your brother pay you for your work?

A. On an average of $75.00 a month.

Q. Does your brother own the business?

A. His wife runs it and he works on the place too."

This is the very kind of proceedings that the courts have time and again censored as depriving the alien of constitutional rights and as being in contravention of the Immigration laws of the United States and it is the very kind of evidence which the Supreme Court of the United States has unequivocally condemned in the recent case of *Bridges v. Wixon,* 326 U. S. 135, 89 L. Ed. 2103, wherein it is said:

"O'Neil was a government witness. He was intimate with Harry Bridges. During the course of the examination O'Neil was asked about statement which he allegedly had made to investigating officers some months earlier. These statements were not signed by O'Neil. They were not made by interrogation under oath. And it was * * * (151) not * * * shown that O'Neil was asked to swear and sign or that being asked, he refused. They were read into the record and verified by the stenographer who took them down. And an officer testified that later O'Neil had repeated the

statements to him and to other witnesses. These statements were that O'Neil joined the Communist Party in December, 1926; that he walked into Bridges' office one day in 1937 and saw Bridges pasting assessment stamps in a Communist party book; and that Bridges reminded O'Neil that he had not been attending party meetings. O'Neil admitted making statements to the investigating officers but denied making those particular statements. * * * The statements which O'Neil allegedly made were hearsay. We may assume they would be admissible for purposes of impeachment. But they certainly would not be admissible in any criminal case as substantive evidence. Hickory v. United States, 151 US 303, 309, 38 L. Ed. 170, 174, 14 S. Ct. 334; United States v. Block (CCA 2d) 88 F. (2d) 618, 620. So to hold would allow men to be convicted on unsworn testimony of witnesses. * * * (154) a 'practice which runs counter to the notions of fairness on which our legal system is founded. There has been some relaxation of the rule in alien exclusion cases. See United States ex rel. NG Kee Wong v. Corsi (CCA 2d) 65 F. (2d) 564. But we are dealing here with deportation of aliens whose roots may have become, as they are in the present case, deeply fixed in this land. It is true that the courts have been liberal in relaxing the ordinary rules of evidence in administrative hearings. Yet as was aptly stated in Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 93, 57 L. Ed. 431, 434, 33 S. Ct. 185, 'But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended'.

Here the liberty of an individual is at stake. Highly incriminating statements are used against him—statements which were unsworn and which under the governing regulations are inadmissible. We are dealing here with procedural requirements prescribed for the protection of the alien. Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness. * * *

On the record before us it is clear that the use of O'Neil's ex parte statements was highly prejudicial. Those unsworn statements of O'Neil and the testimony of one Lundberg were accepted by the Attorney General * * * (155) as showing * * * that Bridges was a member of the Communist Party. * * *
* * *

In these habeas corpus proceedings the alien does not prove he had an unfair hearing merely by proving the decision to be wrong (United States ex rel. Tisi v. Tod, 264 U.S. 131, 133, 68 L. Ed. 590, 591, 44 S. Ct. 260) or by showing that incompetent evidence was admitted and considered. United States ex. rel. Vajtauer v. Commissioner of Immigration, supra (273 U.S. 106, 71 L. Ed. 560, 47 S. Ct. 302). But the case is different where evidence was improperly received and where but for that evidence it is wholly speculative whether the requisite finding would have been made. Then

there is deportation without a fair hearing which may be corrected on habeas corpus.

See United States ex rel. Vajtauer v. Commissioner of Immigration supra.

Since Harry Bridges has been ordered deported on a misconstruction of the term 'affiliation' as used in the statute and by reason of an unfair hearing on the question of his membership in the Communist party, his detention under the warrant is unlawful. Accordingly, it is unnecessary for us to consider the larger constitutional * * * (157) questions * * * which have been advanced in the challenge to the legality of petitioner's detention under the deportation order."

The same character of judicial expression comes from the Fifth Circuit in the case of *Whitfield v. Hanges* (C.C.A. 8th), 222 Federal 745:

"Indispensable requisites of a fair hearing according to these fundamental principles are that the course of proceeding shall be appropriate to the case and just to the party affected; that the accused shall be notified of the nature of the charge against him in time to meet it; that he shall have such an opportunity to be heard that he may, if he chooses, cross-examine the witnesses against him; that he may have time and opportunity, after all the evidence against him is produced and known to him, to produce evidence and witnesses to refute it; that the decision shall be governed by and based upon the evidence at the hearing, and that only; and that the decision shall not be without substantial evidence taken at the hearing to support it. In re Rosser, 101 Fed.

562, 567, 41 C.C.A. 497; In re Wood & Henderson, 210 U.S. 246, 254, 28 S. Ct. 621, 52 L. Ed. 1046.

That was not a fair hearing in which the inspector after the hearing imparted into the case and based his finding and recommendation of deportation on hearsay and rumors of alleged facts which there was no evidence to support, and which the accused had no notice of and no opportunity to refute at the hearing. Interstate Commerce Comm. v. Louisville & Nash. R.R. Co., 227 U.S. 88, 93, 33 S. Ct. 185, 57 L. Ed. 431; Ex parte Petkos (D.C.) 212 Fed. 275, 277, 278."

Also see *In re Sugano,* 40 Fed. (2d) 961 (U.S. Dist. Ct. S.D. Cal.):

"There are two essential prerequisites before aliens can be deported. It must satisfactorily appear from the evidence, first, that the person illegally entered into the United States and is found herein in such unlawful status, and secondly, the deportation proceedings before the immigration authorities must have been fairly conducted. Each of the aforesaid requirements is equally important, and, unless both are shown by the record of proceedings before the Immigration authorities, there has not been 'due process of law' that is guaranteed to all persons by constitutional government in the United States, and in such event the judicial power of the government should prevent deportation. * * * I am of the opinion that such action was arbitrary, unfair, and violative of the fundamental rights of the alien under the Constitution and Laws of the United States. I think that the denial of the

right of examination of Inspector Bliss was unwarranted and clearly intended to thwart and suppress a fair and open hearing within the meaning of the law. The language of Circuit Judge Sanborn in Ungar v. Seaman (C.C.A.), 4 Fed. (2d) 80, 85, is strikingly analogous to the situation presented by the record in this matter. He said, 'It is not denied that the admissions of aliens when they are not under arrest, freely made to officers or other persons, established by the oral testimony of those officers or persons subject to cross-examination by the accused, may be received in evidence against them at their hearings before the immigration officers, and that such hearings are not bound in all things by the strict rules of evidence which prevail in the courts. But the secret questioning of these aliens by the arresting officers, immediately after their arrest, without counsel or opportunity to procure it, without plain notice of the specific violation of an Act of Congress they were required to meet, and without opportunity or time to prepare to meet it, the admission in evidence of the reports of this secret questioning against them, without the presence or testimony of the reporting officer or any opportunity for the accused to cross-examine them * * * deprived these aliens of the essential elements of due process of law, and rendered this hearing so unfair and unjust that they cannot be sustained.''

and in *Ex parte Radevoeff,* 278 Fed. 227, the District Court for the District of Montana said:

"In deportation hearing if the government resorts to statements, verified or not verified by

> the inspector or others, failing to produce the matter of the statement for the alien for cross-examination it cannot escape the consequences of ex parte and incompetent evidence by any plea of distance or expense. Without cross-examination too often the alien is helpless * * * the law also is that if the proceedings are without the support of substantial and competent evidence, or otherwise unfair, the departments director's decision is subject to review in the Courts and to be defeated by a writ of habeas corpus in release of the alien, that is the case."

Also see *Collier v. Skeffington,* 265 Fed. 17, L.C. 30, wherein the Court says:

> "That an unfair or otherwise misleading record is as much a fraud upon the law and the Secretary of Labor as upon the alien."

The requirements of due process of law, the laws of the United States of America, and the very rules and regulations of the Department of Immigration and Naturalization prohibit the use of the statement of Phillip C. Burner which is the only evidence that appellant ever engaged as a farm laborer and this Court should not countenance his deportation to Japan. The uprooting of family ties and as one Court has said, "the taking from him of rights almost as dear as life itself." On this class of evidence we respectfully submit that on this ground alone the order of the District Court should be reversed, even though no other error appeared in the record.

"4. THAT THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION REQUIRES THAT PRIOR TO DEPORTATION OF AN ALIEN HE BE GIVEN A FULL AND FAIR HEARING UPON THE CHARGES STATED IN THE WARRANT OF ARREST, AND THAT AN ALIEN CANNOT BE DEPORTED UPON ANY GROUNDS OTHER THAN STATED IN THE WARRANT OF ARREST, AND PARTICULARLY UPON WHICH HE HAD NOT HAD NOTICE AND OPPORTUNITY TO PREPARE FOR A FULL AND FAIR HEARING."

This proposition refers to Specifications of Error Nos. I, II, III, V, VI, VII and VIII.

The warrant and arrest for arrest of alien directed his arrest upon the grounds that he had departed from his exempt status which was the status of "treaty trader" under the statutes hereinbefore referred to. (T. R. 62.) The findings of fact and conclusions of law of the Immigration and Naturalization Service and the order of deportation ordered him deported upon the grounds stated in the warrant. (T. R. 84.) The findings of fact and conclusions of law of the Board of Immigration Appeals (T. R. 84) find that the treaty of Commerce and Navigation between the United States and Japan was abrogated on January 26, 1940. There is no charge in the warrant that the treaty of Commerce and Navigation had been abrogated. This is a new matter with which appellant was first confronted on the day of the hearing of the writ of habeas corpus and which was not presented at the hearing accorded appellant at Phoenix, Arizona, January 24, 1941. He had no notice that he would have to meet that charge and no opportunity to meet or refute it or to in any manner show that the abrogation of the treaty would not affect him.

Such deportation upon a charge not stated in the warrant of arrest and which appellant had no opportunity to meet or prepare for denies appellant due process of law and is contrary to law and the finding and order of deportation based upon such grounds should be annulled and held for naught by this Court. A quite often cited case is *Throumoulopolou v. United States,* C.C.A. 1, 3 Fed. (2d) 803, wherein the petitioner was charged in the warrant of arrest with being subject to arrest and deportation on certain grounds. The Circuit Court of Appeals found that the secretary had ordered the appellant deported upon a ground upon which he was not charged in the warrant of arrest and upon which he had never been tried or had a hearing. The Circuit Court says this was error and says:

> "If she is to be deported for knowingly using the passport, not issued to or designed for her use it can be done only on a finding to that effect by the District Director after hearing before him on such charge. The decree of the district court is reversed and cause remanded to that court, with directions to discharge petitioner."

In *Ex parte Nagle,* 11 Fed. (2d) 178, it is held the government can deport under its warrant only for the cause charged and stated therein.

See also, *Ex parte Turner,* 10 Fed. (2d) 816.

And to the same effect is *Wong Sun Fay v. United States* (C.C.A. 9th), 13 Fed. (2d) 67, L.C. 68.

> "It follows, that, as respects a Chinese person who has been admitted in apparent compliance with the treaty and acts of Congress as a member

of a privileged class, in any proceeding instituted for his deportation on the basis of fraudulent entry, seasonable notice of a charge to that effect must be given to him, so that he may have fair opportunity to meet it; anything less than this would ignore the prescribed evidential effect of certificates issued and visaed pursuant to the treaty. We therefore agree with Judge Gilbert, who in Lui Hip Chin v. Plummer, supra, when speaking of the absence of a charge that appellant had entered with the intention of becoming a laborer, or had procured his certificate as a merchant through fraud or misrepresentation, said, 'If such fraud or misrepresentation was intended to be relied upon as the ground of his deportation, he was entitled to be advised of it'. Lo Hop v. United States, supra.

If, therefore, the appellant was ordered deported for the reason stated in the two warrants, the deportation was unauthorized, and if ordered deported for some other reason, of which he was not advised, the hearing was manifestly unfair."

We respectfully submit that upon the matters and things hereinbefore set forth and the law that the judgment of the United States District Court for the District of Arizona should be reversed and the appellant ordered discharged.

Dated, Phoenix, Arizona,
June 26, 1946.

Respectfully submitted,
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